JOOSBI OMAR
versus
TONGAI MATUTU
and
RAY MUZENDA
and
LUCIA MASEKESA
And
JOUBERT MADZUMWE
and
THE ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 5 June and 13 August 2008.

ELECTION PETITION

Mr F Gijima for petitioner
Adv H Zhou for 1st respondent
Mr G C Chikumbirike for 2nd respondent.

MAKARAU JP: The hearing of argument on the preliminary points arising from this election petition was consolidated with hearings in seven other cases. I have already handed judgment in some of the eight petitions as I deemed it administratively convenient to hand down a judgment in respect of each petition, while making reference to the submissions made during the consolidated hearing.

The petitioner was a candidate in the harmonized elections that were held on 29 March 2008 for the Masvingo Urban House of Assembly Constituency. He and the second to fifth respondents lost to the first respondent who polled 7048 votes against the petitioner's 7029. The polls garnered by the other losing candidates were not given in the petition.

Aggrieved by the declaration of the first respondent as the duly elected member of the House of Assembly for Masvingo Urban, the petitioner filed the above petition with this court on 14 April 2008. In what appeared to be standard language used by petitioners belonging to the petitioner's political party, the petitioner alleged various irregularities by the officials of the second respondent in conducting the poll as well as during the counting of the votes. He also alleged that the elections were held against a debilitating economic background caused by sanctions invited by the first respondent's party.

The election petition, having been issued on 14 April as mentioned above, was served on 29 April 2008 upon one Peter, a worker at Harvest House, whose further particulars are not given but who allegedly accepted service on behalf of the first respondent.

There is no evidence on record that the petition was served on any of the other respondents.

When the first pre-trial conference was held in the matter on 19 May 2008, the first respondent had not yet been served with the petition and but heard about the petition from other sources.

In due course the first and sixth respondent responded to the election petition with the first respondent raising two principal points in *limine.* These were whether there had been service of the petition in the circumstances of the matter and whether such service, being in violation of the statutory provision, non-suited the petitioner. In particular, the first respondent noted that the petition had been served out of the time limit set by statute and had not been served personally upon him or at his place of residence or business as provided for in the law.

The sixth respondent alleged mis-joinder and on that basis prayed for a declarator that it had been improperly cited as a party and should be awarded its costs.

At the consolidated hearing of the matter, three issues were argued as follows:

1. whether failing to serve the petition upon the respondent within 10 days has any effect on the petition;
2. whether serving the election petition at the headquarter' of the respondent's political party has any effect on the petition and,
3. whether the second respondent had been properly joined as a respondent in the petition.

It is pertinent in my view that at this stage I set out in full the relevant provision of the Electoral Act [Chapter 2.13], that governs the service of election petitions and the interpretation of which gave rise to the point in *limine* raised by the respondent.

Section 169 of the Act provides:

"Notice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition, shall, within ten days after the presentation of the petition, be served by the petitioner on the respondent personally or by leaving the same at his or her usual or last known dwelling or place of business."

It is common cause in this matter that the election petition was not served within ten days from the date of its presentation but was purportedly served at the first respondent's party headquarters on the eleventh day.

In argument, *Advocate Zhou* for the respondents submitted and correctly so in my view, that the effect of failing to comply with the provisions of section 169 of the Electoral Act [Chapter 2.13] is fatal to the validity of the petition and any proceedings arising therefrom. He further submitted that the decision in *Pio v Smith* 1986 (3)145 SA (ZH) is a correct representation of the law on the issue and that while the case was taken on appeal the finding by the trial court that the language used in the law was peremptory and therefore demanded exact or substantial compliance therewith was not disturbed, the appeal court having decided to dismiss the appeal for lack of merit. *Advocate Zhou* also submitted and again correctly in my view, that the reasoning in *Pio v Smith* was consonant with the thinking in other jurisdictions dealing with similar electoral laws. In this regard he referred me to a number of cases from other jurisdiction where a similar approach had been taken. (See Nair v Teik [1967] 2 All ER 34 (PC)).

For the petitioner, *Mr Gijima* argued that the issue that fell for my determination in this petition (and in other petitions where he was appearing), was whether or not the petitioner had substantially complied with the provisions of the law regarding service of the petition. In *Chabvamuperu and others v E Jacob and Others HH 46/08*, I have had occasion to summarize the arguments by *Mr Gijima* in detail. For convenience, I shall not seek to repeat his entire argument in this judgment.

In raising the argument that he did, Mr *Gijima* was quite clear and correctly so in my view, that the language used in the section is peremptory. He proceeded to argue that the failure by the petitioner to strictly comply with the peremptory language of the statute does not however invalidate the petition.

The argument raised by *Mr Gijima* appears to me to neatly dovetail with the sentiments recently expressed by the Supreme Court in *Shumba and Another v The Zimbabwe Electoral Commission and Another* SC 11/08. In considering the effects of a failure to cite the Chairperson of the Zimbabwe Electoral Commission as provided for in section 18 of the Zimbabwe Electoral Act [Chapter 2.13], the Chief Justice had this to say on page 21 ff of the cyclostyled judgment:

"It is the generally accepted rule of interpretation that the use of peremptory words such as "shall" as opposed to "may" is indicative of the legislature's intention to make a provision directory. In some instances the legislature explicitly provides that failure to comply with a statutory provision is fatal. In other instances, the legislature specifically provides that failure to comply is not fatal. In both of the above instances no difficulty arises. The difficulty usually arises where the legislature has made no specific indication as to whether failure to comply is fatal or not".

At page 22 he continued to observe that where the legislature has not expressly indicated the effect of a failure to comply with the enactment, it is presumed that it has left it in the discretion of the courts to determine such effect.

The learned Chief Justice went on to cite a passage from the author Francis Benion in his book: *Statutory Interpretation* and zeroed in on one of the guidelines that the author suggests in the determination of whether failure to comply with a statutory provision is fatal or is a mere irregularity. This is what he had to say on page 22 of the judgment:

"One of these guiding principles is the possible consequences of a particular interpretation. If interpreting the non-compliance with a statutory provision leads to consequences totally disproportionate to the mischief intended to be remedied, the presumption is that Parliament did not intend such a consequence and therefore the provision is directory."

In *Chabvamuperu and Others v Jacob and Others* (supra), I formed the opinion that section 169 of the Electoral Act was enacted with the object of containing the time frame within which election petitions presented to court are disposed of. I formed the further opinion that the purpose of speedily determining election petitions as opposed to other suits that come before the courts is because elections are in the public domain and have the effect of disrupting the working of parliament itself and the executive as it derives some of its members from the elected candidates. The importance of speedily resolving election petitions has been underscored by the provisions of the Act that not only put a lid on the time the court must render a decision in the matter at first instance but has also prescribed that an appeal from the lower court must be determined within six months. I remain of the view that the purpose of section 169 is to bring speed and certainty to bear on the prosecution and determination of election petitions. The possibility of election petitions that go on beyond the life of the tenure of office to which they relate is in my view, the mischief that the enactment was trying to cure.

In *casu*, the election petition was purportedly served one day out of time. Applying the approach enunciated in the *Shumba* case, it would appear that to invalidate the petition because it is one day late is totally out of proportion with the mischief that the provision was enacted to curb. It can hardly be argued that failure to serve the petition by one day would thereby defeat

the speedy resolution of the petition. On that basis, there is room to argue that the consequence of invalidating the petition on account of the delay is manifestly disproportionate to the mischief intended to be remedied.

The issue in my view is however not as simple at it appears. At cross purposes with this general provision of the law is the principle that a court that is set up by statute does not possess any inherent powers and cannot travel outside the four corners of the statute and abrogate to itself powers that are not expressly granted to it by the statute.

It is trite that the Electoral Court has no inherent powers and was not specifically granted powers to extend on good cause any time period limited in the Act. Thus, while in general, a court may determine the effect of failing to comply with a statutory provision where such is not expressly provided for, this only applies to courts with inherent powers and not to the Electoral Court.

The petitioner in *casu* has argued that he could not serve the petition in time as he was waiting for the amount of security to be furnished to the respondents to be set. In my view, even assuming that the reason tendered by the petitioner for the delay was true, it may have constituted good grounds for condoning the delay. As explained above, this court has no power to condone a departure form an express provision of a statute. It is a creature of statute that must not travel outside the four corners of the statute that created it. If the statute does not grant it powers to condone a departure from the provisions of the statute, it cannot abrogate such powers to itself. It has no inherent powers to fall back on.

It is also pertinent in my view to note that the petitioner in *casu* did not even attempt to serve the petition on the other respondents yet he did not file any notices of withdrawal against these respondents. To argue that his petition remained valid in the circumstances is in my view untenable.

The first respondent was not personally served with the petition. It was left at his party's headquarters with one Peter, whose second name is not given. The first respondent was a candidate for the Masvingo Urban constituency. This is hundreds of kilometers from Harare where the petition was purportedly served.

The law provides that the petition be served personally upon the respondent or be left at his usual or last known place of residence or business. The intention of the legislature in enacting this provision is in my view to enable the petition to know at the earliest possible of

the suit against him. In *casu*, the first respondent only knew of the petition after he had been summoned by the court to attend a pre-trial conference in the matter.

On the basis of the foregoing, I would therefore hold that the failure by the petitioner to serve the petition upon the respondents in the manner provided for in the law non-suits the petitioner and renders his petition invalid. In my view, the non compliance by the petitioner with the provisions of the law cannot be condoned as the Electoral Court has no powers to do so. It thus remains a non- compliance and cannot be regarded as a mere irregularity with no fatal consequences.

The finding I make above disposes of the matter before me and both respondents are entitled to their costs from the petitioner.

As against the second respondent, I may mention in passing that I would have found that its citation as a party in the above petition was improper for two main reasons.

Firstly, and as correctly submitted by *Mr Chikumbirike* in my view, in terms of Part XXVIII of the Electoral Act, only the winning candidate in the election whose result is being challenged can be a respondent in that election petition. This is so because the term "respondent" for the purposes of election petitions is defined in the law. Thus to put it in another way, for election petitions brought under the provisions of the Act, only those whose are defined as respondents can be properly cited as such.

Secondly and in any event, assuming that the court, using the High Court Rules 1971, could entertain an application for the joinder of the second respondent under common law, a point raised and not determined, the correct legal persona to cite would be the Chairman of the Commission and not the Commission itself. The manner in which the Commission is to be cited in legal proceedings is provided for in the Zimbabwe Commission Act [Chapter 2.12] and this was not done in the above petition.

In the result, I make the following order:

1. The petition is dismissed.
2. The petitioner shall meet the costs of both respondents.

Mutumbwa Mugabe & Partners, petitioner's legal practitioners.
Mbidzo Muchadehama and Makoni, first respondent's legal practitioners.
Chikumbirike & Associates, second respondent's legal practitioners.